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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/810,857	03/26/2004	Thomas Gottemoller	030939	7118
41835	7590	10/17/2006		
KIRKPATRICK & LOCKHART NICHOLSON GRAHAM LLP HENRY W. OLIVER BUILDING 535 SMITHFIELD STREET PITTSBURGH, PA 15222			EXAMINER WEIER, ANTHONY J	
			ART UNIT	PAPER NUMBER
			1761	

DATE MAILED: 10/17/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/810,857

Applicant(s)

GOTTEMOLLER, THOMAS

Examiner

Anthony Weier

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 03 August 2006.  
2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.  
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 102-143, 156-189 and 193-204 is/are pending in the application.  
4a) Of the above claim(s) 129, 160, 176, 184 and 195 is/are withdrawn from consideration.  
5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.  
6) ☒ Claim(s) 102-128, 130-143, 156-159, 161-175, 177-183, 185-189, 193, 194, and 196-204 is/are rejected.  
7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.  
8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.  
10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)  
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)  
3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.  
4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_.  
5) ☐ Notice of Informal Patent Application  
6) ☐ Other: \_\_\_\_\_.

**DETAILED ACTION**

***Election/Restrictions***

1. This application contains claims drawn to an invention nonelected with traverse in the paper filed 1/19/06. A complete reply to the final rejection must include cancellation of nonelected claims or other appropriate action (37 CFR 1.144) See MPEP § 821.01.

***Claim Rejections - 35 USC § 112***

2. Claims 126, 128, 130-143, 157, 159, 161-174, 183, 185-189, 194, and 196-204 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 126, 128, 157, 159, 183, and 194 are indefinite in that it is not clear as to what is encompassed by the terminology "simulated milk product" and "simulated meat product." Although it is noted, as set forth by Applicant, that the specification provides information regarding these terms (paragraphs 29 and 30), these are examples of same and not specific definitions regarding same. In other words, even in view of such examples, it appears indefinite as to the scope of such terminology.

***Claim Rejections - 35 USC § 102***

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent

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granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

4. Claims 102-124, 126-128, 130-142, 156-159, 161-173, 175, 178-183, 186-189, 193, 194, and 197-204 are rejected under 35 U.S.C. 102(b) as being anticipated by EP 1127495.

EP 1127495 discloses a ground soy product having a particle size of, for example, 1-10 microns and a median particle size of between 10-20 microns (see Figure 2), wherein said ground soy product is used in various food compositions such as meat, beverages, and ice cream and wherein said product would be expected to have open portions such that water or a water based liquid is allowed into intracellular spaces of said soy product since same has been ground to such a fine level. It is expected that said product would have the stability as called for in the instant claims due to the similarity in processing with the instant invention and the dry nature of the product.

With regard to the instant claims call for a mean particle size of about 22 or about 24 microns, the presence of the upper limit of 20 microns in EP '495 is considered to fall within the range surrounding each value due to the term "about" which provides values below and above same. In addition, virtually all of the particles are less than the 44 and 45 micron limit called for in claims 201-204 (see Figure 2).

5. Claims 102-128, 130-143, 156, 157, 159, and 161-174 are rejected under 35 U.S.C. 102(b) as being anticipated by EP 565260.

EP 565260 discloses a ground soybean product having a particle size between 0.1 and 20 microns wherein said product is used in a variety of food products including milks and icings (e.g. claims, page 3, lines 10-42, Example 5). Said product would be expected to have open portions such that water or a water based liquid is allowed into intracellular spaces of said soy product since same has been ground to such a fine level. It is further expected that said product would have the stability as called for in the instant claims due to the similarity in processing with the instant invention and the dry nature of the product.

6. Claims 102-128, 130-143, 156-159, 161-175, 177-183, 185-189, 193, 194, and 196-200 are rejected under 35 U.S.C. 102(b) as being anticipated by Wallis et al (U.S. Patent No. 6244528).

Wallis et al discloses ground soybean products having a particle size between 5 and 25 microns wherein same are employed in a variety of food product such as soymilk, tofu, and dairy analogs. Said product would be expected to have open portions such that water or a water based liquid is allowed into intracellular spaces of said soy product since same has been ground to such a fine level. It is further expected that said product would have the stability as called for in the instant claims due to the similarity in processing with the instant invention and the dry nature of the product (col. 1, line 34 – col. 2, line 57; col. 3, line 28 to col. 4, line 34).

7. Claims 102-128, 130-143, 156-159, and 161-174 are rejected under 35 U.S.C. 102(b) as being anticipated by any one of Mustakas et al (U.S. Patent No. 3639129), GB 1400470, Sudo et al (U.S. Patent No. 4902526), and JP 60-141247.

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Mustakas et al discloses ground soybean products having a particle size between 5 and 40 microns wherein same are employed in, for example, soy milk (col. 1, line 43 to col. 2, line 75; examples).

GB 1400470 discloses ground soy products having a particle size between 2 and 10 microns wherein same are used in beverages (e.g. soymilk; claims; page 1, lines 49-60, examples).

Sudo et al discloses ground soybean products having a particle size below 50 microns wherein same is used in beverages (e.g. soymilk; col. 2, line 40 – col. 3, line 60).

JP 60-141247 discloses ground soybean products having a particle size below 10 microns wherein same are used in food products such as soymilk or tofu (see Abstract).

Said products of each of the references above would be expected to have open portions such that water or a water based liquid is allowed into intracellular spaces of said soy product since same has been ground to such a fine level. It is further expected that said products would have the stability as called for in the instant claims due to the similarity in processing with the instant invention and the nature of the dried version of the product .

8. Claims 175, 178-183, 186-189, 193, 194, and 196-200 are rejected under 35 U.S.C. 102(b) as being anticipated by WO 01/64055.

WO 01/64055 discloses ground wheat particles with a particle size between 18-25 microns and their use in a variety of food products (e.g. page 10, line 15-32; page

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12, line 15-20). Said product would be expected to have open portions such that water or a water based liquid is allowed into intracellular spaces of said soy product since same has been ground to such a fine level. It is further expected that said product would have the stability as called for in the instant claims due to the similarity in processing with the instant invention and the dry nature of the product.

***Claim Rejections - 35 USC § 103***

9. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

10. Claims 201-204 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wallis et al.

Wallis et al discloses a soya fiber particulate wherein all of the particles are 5 and 25 microns which is less than the limit called for in claims 201-204. Although Wallis et al does not specify the median particle size, the range of sizes recited therein does encompass a particle size of about 22 and 24 microns. Absent a showing of unexpected results, it would have been obvious to one having ordinary skill in the art at the time of the invention to have arrived at such particular size median as a matter of preference.

11. Claims 201-204 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mustakas et al.

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Mustakas et al discloses a soya fiber particulate wherein all of the particles are 5 and 40 microns which is less than the limit called for in claims 201-204. Although Mustakas et al does not specify the median particle size, the range of sizes recited therein does encompass a particle size of about 22 and 24 microns. Absent a showing of unexpected results, it would have been obvious to one having ordinary skill in the art at the time of the invention to have arrived at such particular size median as a matter of preference.

12. Claims 201-204 are rejected under 35 U.S.C. 103(a) as being unpatentable over WO 01/64055.

WO 01/64055 discloses a soya fiber particulate wherein all of the particles are 18-25 microns which is less than the limit called for in claims 201-204. Although WO 01/64055 does not specify the median particle size, the range of sizes recited therein does encompass a particle size of about 22 and 24 microns. Absent a showing of unexpected results, it would have been obvious to one having ordinary skill in the art at the time of the invention to have arrived at such particular size median as a matter of preference.

#### **Applicant's Arguments**

13. Applicant's arguments filed 8/3/06 have been fully considered but they are not persuasive.

Applicant argues with respect to EP 1127495 that there is no indication that the product therein would possess the same characteristics of the soya fibers of the instant invention. It should be first noted that the Examiner did not say all characteristics would



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be the same but focused on the limitation of stability set forth in some of the instant claims. Clearly, it is expected that the product would be stable or shelf-stable for a long length of time due to the dry nature of the product which would not support degradation through microbes, etc. It should be noted that such reasonable assertion has not been shown to be inaccurate, and perhaps, Applicant has the capability to show that such long stability would not occur in EP 1127495 wherein such a convincing showing would be unexpected and contrary in view of the Examiner's reasonable assertion regarding same. Applicant further argues that the soya fiber of the instant invention is not the result of a separation step as set forth in EP '495. However, the instant claims, as presently recited, are broad enough to encompass any portion of soya fiber regardless of the source so long as said portion meets or is expected to meet the limitations as specifically claimed. Applicant further argues that the sedimentation characteristic differs between the two products, though the difference cannot be discerned as the mode of testing is different. Again, it is expected that due to the similarity in the production of the product encompassed by the instant product claims and that of EP '495, it is expected that the sedimentation as set forth in the instant claims would be the same.

Applicant argues with respect to EP 0565260 that there is no indication that the product therein would possess the same characteristics of the soya fibers of the instant invention. It should be first noted that the Examiner did not say all characteristics would be the same but focused on the limitation of stability set forth in some of the instant claims. Clearly, it is expected that the product would be stable or shelf-stable for a long

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length of time due to the dry nature of the product which would not support degradation through microbes, etc. It should be noted that such reasonable assertion has not been shown to be inaccurate, and perhaps, Applicant has the capability to show that such long stability would not occur in EP '260 wherein such a convincing showing would be unexpected and contrary in view of the Examiner's reasonable assertion regarding same.

Applicant argues with respect to Wallis that there is no indication that the product therein would possess the same characteristics of the soya fibers of the instant invention. It should be first noted that the Examiner did not say all characteristics would be the same but focused on the limitation of stability set forth in some of the instant claims. Clearly, it is expected that the product would be stable or shelf-stable for a long length of time due to the dry nature of the product which would not support degradation through microbes, etc. It should be noted that such reasonable assertion has not been shown to be inaccurate, and perhaps, Applicant has the capability to show that such long stability would not occur in Wallis wherein such a convincing showing would be unexpected and contrary in view of the Examiner's reasonable assertion regarding same. Applicant further argues that the soya fiber of the instant invention is not the result of a separation step as set forth in Wallis. However, the instant claims, as presently recited, are broad enough to encompass any portion of soya fiber regardless of the source so long as said portion meets or is expected to meet the limitations as specifically claimed.

Applicant argues with respect to Mustakas that there is no indication that the product therein would possess the same open portions as called for in the instant claims. Clearly, it is expected that the drying and removal of water from the product would provide for open spaces as called for in the instant claims. It should be noted that such reasonable assertion has not been shown to be inaccurate, and perhaps, Applicant has the capability to show that such long stability would not occur in Mustakas wherein such a convincing showing would be unexpected and contrary in view of the Examiner's reasonable assertion regarding same.

Applicant argues with respect to GB 1400470 that there is no indication that the product therein would possess the same open portions as called for in the instant claims. Clearly, it is expected that the drying and removal of water from the product would provide for open spaces as called for in the instant claims. It should be noted that such reasonable assertion has not been shown to be inaccurate, and perhaps, Applicant has the capability to show that such long stability would not occur in Mustakas wherein such a convincing showing would be unexpected and contrary in view of the Examiner's reasonable assertion regarding same. Applicant further argues that the sedimentation characteristic differs between the two products, though the difference cannot be discerned as the mode of testing is different. Again, it is expected that due to the similarity in the production of the product encompassed by the instant product claims and that of GB '470, it is expected that the sedimentation as set forth in the instant claims would be the same.

Applicant argues with respect to Sudo that there is no indication that the product therein would possess the same characteristics of the soya fibers of the instant invention. It should be first noted that the Examiner did not say all characteristics would be the same but focused on the limitations of stability and open spaces set forth in some of the instant claims. Clearly, it is expected that the product would be stable or shelf-stable for a long length of time due to the dry nature of the product which would not support degradation through microbes, etc. And even though, the product of Sudo may employ vegetable fat to aid in providing a stable emulsion, the instant claims do not appear to restrict the presence of vegetable fat (which would be the case if the claimed composition were presented using "consisting of" language). Moreover, it is expected that the drying and removal of water from the product would provide for open spaces as called for in the instant claims. It should be noted that such reasonable assertion has not been shown to be inaccurate, and perhaps, Applicant has the capability to show that such long stability would not occur in Sudo wherein such a convincing showing would be unexpected and contrary in view of the Examiner's reasonable assertion regarding same.

Applicant argues with respect to JP 60-141247 and WO 01/64055 that there is no indication that the products therein would possess the same characteristics of the soya fibers of the instant invention. It should be first noted that the Examiner did not say all characteristics would be the same but focused on the limitations of stability and open spaces set forth in some of the instant claims. Clearly, it is expected that the product would be stable or shelf-stable for a long length of time due to the dry nature of the

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product which would not support degradation through microbes, etc. Moreover, it is expected that the drying and removal of water from the product would provide for open spaces as called for in the instant claims. It should be noted that such reasonable assertion has not been shown to be inaccurate, and perhaps, Applicant has the capability to show that such long stability and open space capacity would not occur in JP 60-141247 or WO '055 wherein such a convincing showing would be unexpected and contrary in view of the Examiner's reasonable assertion regarding same.

All other arguments have been addressed in view of the rejections set forth above.

### Conclusion

14. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

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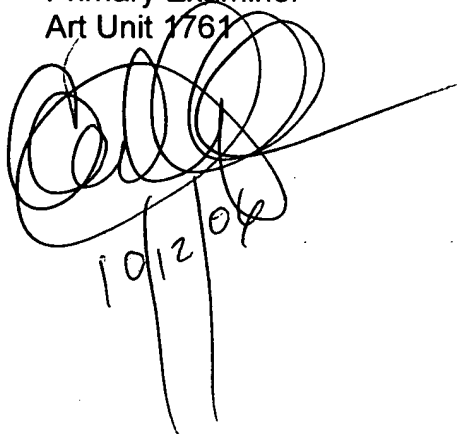
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Anthony Weier whose telephone number is 571-272-1409. The examiner can normally be reached on Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Anthony Weier  
October 12, 2006

Anthony Weier  
Primary Examiner  
Art Unit 1761



10/12/06